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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. .....

MARIE BALDASSARO,
Petitioner

— VS —

THE STATE OF OHIO,
Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioner, Marie Baldassaro, was indicted by the Franklin County Grand Jury and charged with one (1) count of Perjury in violation of Section 2917.25 of the Revised Code of Ohio.

Count one (1) of said indictment charged that Marie Baldassaro did "on or about the 11th day of March, 1970, within the County of Franklin aforesaid, appear as a witness before the Grand Jury of Franklin County, Ohio, which was investigating possible violations of Section 2917.01, Revised Code of Ohio, and after having been sworn on oath lawfully administered, wilfully and corruptly, orally stated a falsehood as to a material matter in said cause as follows:

> "(a) That she had not met nor did she know any present or former officers of the Columbus Police Department.

"(b) That she had never made any payments to any present or former officers of the Columbus Police Department;

"said testimony being material to said cause and being false in the following respects:

"(a) She has met and she does know certain present or former officers of the Columbus Police Department,

"(b) She has made payments to certain present or former officers of the Columbus Police Department,

"contrary to the statute in such case made and provided and against the peace and dignity of the State of Ohio."

Marie Baldassaro subsequently appeared with her retained counsel in the Common Pleas Court of Franklin County, Ohio, before Honorable Frederick T. Williams, Judge, and a jury duly impaneled and sworn, for the trial of her cause. At the conclusion of the trial, the defendant was found guilty as charged in paragraph (a) of the indictment; paragraph (b) having been dismissed by the Court at the close of the case by both sides. The defendant was sentenced to the Ohio State Reformatory for Women according to law; however, she retained her freedom subject to an appeal bond.

The Court of Appeals of Franklin County, Ohio rendered its decision on December 14, 1971, overruling defendant's assignments of error and affirming the judgment of the trial court. Thereafter, counsel for defendant filed a timely motion for leave to appeal from the Court of Appeals to the Ohio Supreme Court; however, such motion was overruled. The case now comes before this Honorable Court upon Marie Baldassaro's petition for a writ of certiorari to the Supreme Court of the United States.

STATEMENT OF FACTS

During the spring of 1970 the defendant-appellant, Marie Baldassaro, was serving time in the Franklin County

Correctional Institute for Women, under sentence for a "numbers" conviction returned in 1969. On March 11, 1970 Miss Baldassaro was called before the lawfully convened Franklin County Grand Jury which was investigating possible violations of R.C. 2917.01 (Bribery), and numbers offenses. (Tr. 23). From those Grand Jury proceedings a bill of indictment against Captain Jerry Ryan of the Columbus Police Department, was rendered, Count 4 of which alleged the receipt by Captain Ryan of illicit funds paid to him by Officer Wilbur Stevens, also of the Columbus Police.

During the aforesaid proceedings of the Grand Jury Miss Baldassaro was asked several questions concerning her acquaintance with certain Columbus Police Officers, having first sworn to the oath administered by the Grand Jury Foreman. (Tr. 11, 23).

During the proceedings Miss Baldassaro was given an opportunity, upon her request, to consult with her attorney in private for approximately ten minutes. (Tr. 16, 26).

At Marie Baldassaro's subsequent trial for perjury Mr. John W. Saffell, who had been a court reporter for ten years and who had transcribed the proceedings, and Mr. George Snodgrass, Grand Jury Foreman, testified as to her answers to those questions.

Mr. Saffell testified that the question had been asked, "Do you know any members of the Columbus Police Department who are either officers now or have been officers on the Columbus Police Department?" (Tr. 14). He verified the form of the question, and Miss Baldassaro's *negative* response (Tr. 14), by referring to his notes. Mr. Saffell further testified that Miss Baldassaro had been asked if she knew Officer Melvin Helmandollar, and replied that she did not.

Mr. Snodgrass attested to the nature of the proceeding and to the fact that Miss Baldassaro had been informed of the same. (Tr. 24).

At the defendant-appellant's perjury trial Officer Helmandollar, himself previously involved in charges relating to bribery offenses, testified that he had been a member of the Vice Squad, primarily gambling (Tr. 30), that in such a capacity he had come to know Marie Baldassaro (Tr. 32, 33), and identified her at trial (*Id.*).

Officer Helmandollar also stated that he had had conversations with Miss Baldassaro while he was a police officer and, that he had received money from her during the time he was with the Vice Squad, while in the presence of Officer Wilbur Stevens. Helmandollar contended, however, that the money was a gift ("People just give officers money for rendering public service, don't they?") (Tr. 44).

Officer Phillip Henry, formerly of the Vice Squad testified for the prosecution also, stating that he had visited the beauty salon of a Mrs. Mietta, (Miss Baldassaro's sister) with Officer Robert ("Tal") Brodt, and was introduced ("more or less") to Marie Baldassaro at the salon. (Tr. 60). Officer Brodt did the talking. Mrs. Mietta had later visited Officer Brodt while he was in the hospital; Officer Henry was there too, but he couldn't recall if Marie Baldassaro was present. (Tr. 61).

The final testimony at trial was that of Marie Baldassaro. She recalled being shown a list of names of Columbus Police officers by the Grand Jury, but was shown no pictures. (Tr. 71-72). She denied knowing their names. (Tr. 72). Miss Baldassaro denied having known Melvin Helmandollar by name until he appeared at the Grand Jury proceeding. (Tr. 80). As to whether she had ever met Officer Brodt—she did not recall knowing Officer Brodt, and she "really didn't know" whether or not she visited Officer Brodt at Mercy Hospital. (Tr. 80).

To test the defendant-appellant's credibility the prosecutor inquired into her arrest record. Miss Baldassaro was asked: "And over 20 years, how many times would you say you have been arrested in connection with numbers?" Her reply was: "Once". The prosecution then brought out the record to show that she had been arrested three times (Tr. 87), and had been convicted twice. (Tr. 88). She then stated that at the time of her arrest on her last conviction she had been making numbers collections in Columbus. (Tr. 96-98).

Finally, Miss Baldassaro was asked if she recalled being asked by the Grand Jury if "she knew any members of the Columbus Police Department who are either officers now or have been officers on the Columbus Police Department?" She could not recall the question being asked, or that she had answered, "No." (Tr. 97-99).

At the close of the case for both sides the Court dismissed part (b) of the indictment relating to false testimony as to payment of present or former police officers. (Tr. 103).

Following the Court's instructions and deliberation, the jury returned a verdict of guilty as charged in paragraph (a) of the perjury indictment, (Tr. 118), relating to Miss Baldassaro's past acquaintance with police officers.

ARGUMENT

As To Question 1:

Section 2917.25, Ohio Revised Code, defines the elements of perjury as follows:

"1) the willful and corrupt statement of a falsehood

"2) as to a material matter

"3) under oath lawfully administered

"4) said oath being required by law, and

"5) before a court or tribunal

"6) lawfully convened within the jurisdiction."

The testimony which was the substance of Marie Baldassaro's perjury conviction was given at a lawfully convened proceeding of the Franklin County Grand Jury, under a mandatory oath administered by the foreman pursuant to the terms of Section 2939.13, Ohio Revised Code. Of the elements which are left, it is significant to note that petitioner attacks only the definition of *"a material matter"* to support her claim that said statute is unconstitutional.

The indictment charging Marie Baldassaro with perjury contained two alleged falsehoods uttered by Miss Baldassaro during her grand jury testimony. Admittedly, one of these falsehoods (paragraph b) lacked the necessary proof and was dismissed at trial; however, the defendant was convicted of perjuring herself with respect to paragraph (A), i.e. "she met and does know certain present or former officers of the Columbus Police Department." The petitioner attempts to support her attack on "materiality" by isolating the subject matter referred to and viewing it in the abstract. Although the materiality of the matter may be established even through that approach, it is more appropriate to analyze the materiality of the matter within the proper context of the Grand Jury investigation.

The inescapable conclusion is that Marie Baldassaro was well aware of the subject matter under investigation because her personal conduct was at issue and the prosecutor informed her of the nature of the inquiry. The subject matter being investigated was alleged bribes or "pay-offs" to Columbus Police Officers assigned to the Vice Squad. Therefore, the matter of Marie Baldassaro's involvement in the numbers game (for which she had been convicted), and her acquaintance with officers (or former officers) of the Columbus Police Department, was manifestly material to the purpose of the Grand Jury

bribery investigation, as the record of the trial below indicates, and as the jury so found under the proper instructions by the Court.

Petitioner appropriately cites 16 Am. Jur. 2d, Constitutional Law Section 552, pages 951 and 952, in relevant part, (Br. 5) to establish the requirement of definiteness with regard to criminal statutes. Viewing Ohio's perjury statute (2917.25 R.C.) within the context of the cited language compels a finding that the said statute fully comports with the due process requirements discussed in the quoted passage.

Stated in rather simple terms, the acts prohibited by Section 2917.25 O.R.C. are "lying under oath," and it is a relatively simple exercise to conform one's conduct to the law. One who affirms under oath to tell the truth is reasonably expected to do just that, and the conforming conduct is easily followed by refusing to lie. The additional requirement that the falsehood relate to a material element is a limiting protection favoring those testifying to foreclose indictments arising out of misstatements regarding inconsequential matters. Marie Baldassaro's testimony under oath was false with regard to a clearly significant fact relating to the investigation at issue.

Implicit in petitioner's argument is an analogy drawn between the term "material matter" under 2917.25 O.R.C. and the term "suspicion" used in a District of Columbia statute. However, such analogy is not applicable. While it is very difficult to ascertain the conduct necessary to avoid "suspicion," it is relatively simple to determine the conduct required to avoid a falsehood under oath, i.e. tell the truth. If there is any question regarding the materiality of the question posed, and the anticipated answer, difficulty can be avoided by speaking the truth in all instances, as the witness is expected to do. We respectfully submit that the statute as presently written

meets the due process requirements of constitutionality, and to invalidate the element of "material matter" as petitioner suggests, would broaden the scope of the statute rather than clarify or restrict it.

Under the facts of the instant case, petitioner knew that the question posed was material and she suffered no prejudice arising from the language of the statute.

As To Question 2.

In Ohio, in order to have an individual released from confinement to testify in a judicial proceeding, it is procedurally necessary to issue a subpoena *duces tecum* to the county Sheriff's office, to produce the named witness. Such a procedure was followed in the instant case. Petitioner's counsel may have no evidence that Miss Baldassaro was subpoened to appear because the proceedings were conducted in secret. Thus, petitioner appeared at the Grand Jury hearing pursuant to a valid subpoena.

In her capacity as a duly subpoened witness before the Grand Jury of Franklin County, petitioner was not entitled to the constitutional rights commonly referred to as the "Miranda Warnings." The case *Miranda* v. *Arizona* (1966), 86 S.Ct. 1602 at p. 1612 clearly describes the circumstances under which such "warnings" are applicable, and the present case does not fall within such designated circumstances. Miss Baldassaro was not the subject of in-custody police interrogation. Counsel for petitioner are attempting to equate "inculpatory statements" with "lying under oath," and they can not be successful. This same reasoning is manifested throughout their argument relating to the Fifth Amendment protection against self-incrimination. Although it is well settled that a witness can not be compelled to incriminate himself, it is not a necessary concomitant of that axiom to anticipate that the witness will intentionally lie. Moreover, the statements

made by Miss Baldassaro came after her consultation with counsel, and such statements were used to prove perjury, not to implicate her in a scheme of bribery. In conclusion, it is important to correct a misstatement contained in petitioner's brief which reads, "Ohio does not have immunity statutes covering testimony of witnesses." (Br. 7). Section 2917.04 of the Ohio Revised Code (Appendix, Exhibit A), provides immunity upon the recommendation of the prosecuting attorney to witnesses testifying in bribery cases.

As To Question 3.

Upon the authority of the case *State* v. *DeHass* (1967), 10 Ohio St. 2d 230, the Franklin County Court of Appeals refused to reverse petitioner's conviction for perjury. The Ohio Supreme Court in *State* v. *DeHass*, held as follows:

> "A reviewing court may not reverse a judgment of conviction in a criminal case in a trial court, where the record shows that a guilty verdict was returned by a jury on sufficient evidence and where no prejudicial error occurred in the actual trial of the case or in the instructions given by the court."

This language is far different from stating that a higher court may not *review* a case, and it is simply inaccurate to state that "The Franklin County Court of Appeals in its reviewing decision stated that it could not review a case based on the manifest weight of the evidence." (Br. 8). If such were true, the Court of Appeals could have summarily dismissed Miss Baldassaro's appeal since the only assignment of error raised in that court was, "The verdict of the jury was against the manifest weight of the evidence and contrary to law." The fact that the court did review her conviction tends to destroy counsel's interpretation of the *DeHass* decision. The Court of Appeals reviewed the record and appropriately concluded

that Miss Baldassaro's conviction was supported by the manifest weight of the evidence. Since no prejudicial error was found to exist in the actual trial of the case or in the instructions given to the jury by the court, in fact prejudicial error was not even alleged, the affirmation of petitioner's conviction was adequately supported, and the Court of Appeals refusal to reverse Marie Baldassaro's conviction can not be taken to constitute a denial of Fourteenth Amendment rights.

The Supreme Court of Ohio, on June 9, 1972, in Case No. 72-202, overruled petitioner's motion for leave to appeal from the Franklin County Court of Appeals.

CONCLUSION

For the reasons stated hereinabove, it is respectfully urged that the petition for a writ of certiorari to the Supreme Court of the United States be denied.

Respectfully submitted,

GEORGE C. SMITH

George C. Smith
Prosecuting Attorney, Franklin County, Ohio
Member of Bar
Supreme Court of the United States

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief in Opposition was mailed this ..... day of November, 1972, to Jerry Weiner, 171 East Livingston Avenue, Columbus, Ohio 43215 and to William S. Friedman, 88 East Broad Street, Columbus, Ohio 43215, counsel for petitioner.

GEORGE C. SMITH

George C. Smith
Prosecuting Attorney, Franklin County, Ohio

EXHIBIT A

Section 2917.04 Ohio Revised Code.

2917.04 (12824-1). Bribery cases; immunity bath.

Whoever violates sections 2917.01 and 2917.03 of the Revised Code, is a competent witness against another person so offending and, on the recommendation of the prosecuting attorney and approval of the court, may be compelled to attend and testify in the same manner as any other person is in any court of record in any criminal proceeding prosecuted by the attorney general or any prosecuting attorney, for the violation of said sections, but no individual shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he testifies or produces evidence, documentary or otherwise, before any such court or grand jury.